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Zoning—Arlington Heights: Planning for a Segregated Community

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ARLINGTON HEIGHTS: PLANNING FOR A SEGREGATED COMMUNITY

The need for public housing[1] has produced a major dilemma in today's large metropolitan areas.[2] The lack of adequate housing in the central cities[3] and the availability of vacant land in the suburbs[4] has made the suburbs ideal locations for the construction of low-income housing.[5] Such construction, however, has been strongly resisted by these predominantly white communities. Litigants, relying on the equal protection clause of the United States Constitution,[6] have chal-

1. The housing needs of the United States can be viewed in two ways. The first is to compare the income of the families and the cost of housing. This produces an estimate of "noneffective demand households" or those families who are unable to afford adequate housing. According to United States Housing Needs; 1968-1978 (TEMPO, General Electric's Center for Advanced Studies), prepared for the President's Committee on Urban Housing, by 1978, 7.7% of white families and 18.3% of black families will fall into this category. The Committee estimates "that six to eight million families must be receiving housing assistance by 1978, if all Americans are to be living in decent housing by that time." PRESIDENT'S COMM. ON URBAN HOUSING, THE REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING—A DECENT HOME 40-42 (1968) [hereinafter cited as THE KAISER REPORT]. The second is to look at the condition of housing itself. The 1970 Census defined adequate housing as having full indoor plumbing facilities and found 4,668,303 inadequate housing units. U.S. BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS—UNITED STATES SUMMARY Table 1 (1971). They also found that 1,028,291 units were overcrowded (in excess of 1.5 persons per room). *Id.* at Table 4.

2. The problem affects the total region including the suburban communities. This is due to the outward pressure exerted by the expanding city population. E. HOOVER & R. VERNON, ANATOMY OF A METROPOLIS 190-92 (1959) *cited in* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971). *See* G. BEYER, HOUSING AND SOCIETY 360-61 (1965). In addition to the actual physical pressure, there is a social responsibility with which the suburbs must deal. *See* Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971).

3. "By 1978 . . . about 60 percent (4.5 million) of all families expected to require housing assistance will be urban dwellers." United States Housing Needs; 1968-1978 (TEMPO, General Electric's Center for Advanced Studies) *cited in* THE KAISER REPORT, note 1 *supra*, at 7.

4. THE KAISER REPORT, note 1 *supra*, at 138-40.

5. In addition to being merely a more attractive choice, the use of land in the suburbs may be a necessity. "Regardless of the extent to which the nation chooses to tear down the central cities and rebuild them, a large share of the new housing, including subsidized housing, developed in the coming decade will have to be located outside of central cities." *Id.* at 140.

6. *See* notes 23-27 and 29-36 *infra*.

lenged the apparently exclusionary zoning practices used to keep low income housing out of suburbia.[7]

The United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[8] held that evidence of the racially segregated nature of the Chicago metropolitan area,[9] and the lack of affirmative action by the village of Arlington Heights to alleviate this problem[10] did not constitute an equal protection violation.[11] Specifically, the village refused a request to rezone an area to allow for multi-family housing[12] on the grounds that such a rezoning would result in a decline in the property values of adjoining areas and would undermine the integrity of their zoning plan.[13] The village's plan called for multi-family housing to be used only as a buffer between single-family homes and commercial or manufacturing districts.[14] On these facts the Supreme Court found that no discriminatory motivation was

7. Exclusionary practices often consist of: large lot zoning which reduces the number of lots subject to development and raises the overall cost of the land; minimum house size regulations which are unrelated to the number of occupants or health and safety standards; single-family zoning in order to exclude less expensive multi-family units; spot-zoning small sections for multi-family housing, such as the buffer policy used in Arlington Heights (*see* text accompanying note 14 *infra*); discretionary permits or variances which allow community officials to select desired land uses and reject others which may take the form of building permits and sewer connection permits. *See generally* Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 520-22 (1971); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 481-85 (1971).

8. 429 U.S. 252 (1977).

9. The population of Arlington Heights was 64,884 in 1970 and of that number, 27 residents were black. The four-township northwest Cook County area increased by 219,000 people between 1960 and 1970 and that increase included only 170 blacks. During this ten-year period, the percentage of blacks decreased in the suburban areas while it increased within the City of Chicago. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413-14 (7th Cir. 1975).

10. "The Village had no other current plans for building low and moderate income housing." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260 (1977). The court of appeals found that Arlington Heights had been "ignoring" and "exploiting the problem." Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413-14 (7th Cir. 1975).

11. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977).

12. *Id.* at 258.

13. *Id.*

14. As a result of this decision, such a buffer policy, if uniformly administered, may provide a method of exclusionary planning which would escape judicial invalidation. *See* note 55 and accompanying text *infra*.

shown and thus no violation of the equal protection clause of the fourteenth amendment had occurred.[15]

The success of challenges to apparent exclusionary practices under the equal protection clause of the Federal Constitution has turned on whether the practice involves a fundamantal interest[16] or a suspect class.[17] Either of these showings triggers the strict scrutiny standard of review[18] which shifts the burden of proof to the defendant by requiring a showing of a compelling governmental interest to justify the action.[19] Since the Supreme Court's decision in *Lindsey v. Normet*[20] that the right to housing does not constitute a fundamental interest, a plaintiff challenging exclusionary zoning must prove that a suspect class is involved. Although a showing of racial discrimination is sufficient to invoke strict scrutiny[21] a review of prominent cases in this area shows

15. To this extent, the Court followed their earlier decision in Washington v. Davis, 426 U.S. 229 (1976), which held that racially discriminatory motivation must be proved. The Court found that the "[r]espondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977).

16. Fundamental interests consist of constitutionally guaranteed rights or those rights necessary in a democratic society. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254-56 (1974), Shapiro v. Thompson 394 U.S. 618, 629-34 (1969) (travel); Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972), Cipriano v. City of Houma, 395 U.S. 701, 706 (1969), Shapiro v. Thompson, 394 U.S. 618, 629-34 (1969), Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668-70 (1966), Reynolds v. Sims, 377 U.S. 533, 554-62 (1964) (voting); Skinner v. Oklahoma, 316 U.S. 533, 541 (1942) (procreation); Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95-99 (1972) (free speech); Roe v. Wade, 410 U.S. 113 (1973), Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972), Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Williams v. Illinois, 399 U.S. 235 (1970), Douglas v. California, 372 U.S. 353 (1963), Griffin v. Illinois, 351 U.S. 12 (1956) (rights under criminal procedure).

17. Suspect classes include: alienage, *In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 641 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971); national origin, Hernandez v. Texas, 347 U.S. 475, 478-79 (1954); Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 215, 216 (1944); Hirabayaschi v. United States 320 U.S. 81 (1943); race, Loving v. Virginia, 388 U.S. 1, 10-11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); and possibly sex, Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality holding sex suspect). *See generally* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV.. 617 (1974).

18. Strict scrutiny review is the counterpart of the rational relation test under the two-tiered approach to equal protection. *See generally Developments—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

19. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); Dunn v. Blumstein, 405 U.S. 330, 337 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

20. 405 U.S. 56 (1972).

21. *See* note 17 *supra*.

that the courts have differed as to the degree of proof necessary to establish such a case.[22]

In *James v. Valtierra*,[23] the Supreme Court found that a California law requiring a public referendum to approve the building of low-income housing was not a violation of the equal protection clause. Since the referendum was required for all such housing, not only those which were to be occupied by racial minorities, the plaintiffs established only that the law had a greater impact on the poor.[24] The Court held that mere disproportionate impact was not sufficient to prove discrimination under the fourteenth amendment.[25] In cases following *Valtierra* this holding became authority for the principle that proof of a disproportionate impact on a minority group would not invalidate an otherwise neutral law or act.[26] Other courts, however, have found the *Valtierra* analysis inappropriate where additional evidence of discrimination exists.[27]

In *Kennedy Park Homes Association v. City of Lackawanna*,[28] the city initially refused to rezone a parcel of land to allow construction of low-income housing. After agreeing to rezone, the city then declared a

22. *See* notes 27, 36 and accompanying text *infra*.

23. 402 U.S. 137 (1971).

24. *Id.* at 141.

25. *Id.* at 143.

26. In Citizens Comm. for Farraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), New York City's Housing and Development Administration decided to terminate a proposed project which would have consisted of 80% middle-income housing and 20% low-income housing. This action was found to be a political response to local opposition but not racially motivated. The court found that the cancelled "project was only one of many city housing projects." *Id.* at 1070. They also noted the distinction between the city cancelling its own project and a situation where the city prevents a private party from building low-income housing. Here, "[t]he money tentatively allocated to the Faraday Wood project would be available for another housing project. In contrast, when a private developer is prevented from building public housing in a city, no such housing whatever is provided to the city's residents." *Id.* In Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974), a large-lot zoning ordinance which prevented the construction of low-income housing was challenged. The complaining party, however, had not even applied for a zoning variance. In addition to this the court found that "[a]ppellants failed to show that adequate low-cost housing was unavailable elsewhere . . . in areas accessible to appellants' jobs and social services." *Id.* at 254. The court in Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974) found no pattern of discrimination and nothing from which to infer discrimination. *Id.* at 1094. *See also* Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974); English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971).

27. This occurred in cases where more than a mere disproportionate impact could be shown but a clear showing of motivation was difficult to prove. *See* note 34 *infra*.

28. 436 F.2d 108 (2d Cir. 1970).

sewer connection moratorium in order to prevent the project from being built.[29] On these facts the Second Circuit found an equal protection violation[30] by analyzing the city's action in light of its historical context and ultimate effect.[31] Under this analysis the court looked to the chronology of events and found that Lackawanna's actions were guided by "racial motivation resulting in invidious discrimination."[32] The court went on to say, however, that even if the discrimination "resulted from thoughtlessness rather than a purposeful scheme, the city may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify."[33] This dicta was followed in a number of lower federal court cases which held that proof of a discriminatory effect was sufficient to establish the existence of racial discrimination.[34]

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29. Although the sewer system was found to be "grossly deficient," the city had done nothing previously to remedy the situation. Instead, they had allowed other subdivisions to tie into its sewer system, and a sewer connection moratorium in 1967 had lasted less than 100 days. *Id.* at 114.

30. *Id.*

31. This analysis was approved by the Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967). The case involved an equal protection challenge to an amendment to the California Constitution which allowed for private discrimination in the sale, lease, or rental of real property. The Court found that a case by case analysis was needed and that the Supreme Court of California "properly undertook to examine the constitutionality . . . [of the amendment] in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' " *Id.* at 373.

32. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 109 (2d Cir. 1970). The court stated that "[t]he pattern is an old one and exists in many of our communities but appears to be somewhat more subtle in Lackawanna. However, when the chronology of events is considered, the discrimination is clear." *Id.* at 109-10.

33. *Id.* at 114.

34. In the majority of these cases the historical context indicated at least a questionable sequence of events leading to the discriminatory act. *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). Although this case was a Title VIII case, it was handled in a manner similar to the equal protection cases. In *Black Jack* residents of an unincorporated area, after learning that low-income housing was to be built in the vicinity, incorporated the city and rezoned the project site in order to exclude the housing. When the area, now Black Jack, was unincorporated it was governed by St. Louis County and zoned for multi-family construction. The action by the residents came swiftly and indicated their motivating force. United Farmworkers of Florida Hous. Project v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), concerned a refusal by the city to allow a sewer connection or to make an exception to their annexation rule. The facts showed that in many previous instances such actions were readily taken. In Crow v. Brown, 457 F.2d 788 (5th Cir. 1972), the city had initially granted a building permit but then denied the permit after learning that the planned project was for low-income housing. However, while each of the preceding cases dealt with somewhat colorable actions, they all stated the more liberal rule that a showing of racially discriminatory effect was enough to establish a prima facie case. *See also* Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972).

The Seventh Circuit's opinion in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[35] expanded the doctrine used in the cases following *Lackawanna*. Although the court adhered to the *Valtierra* holding that disproportionate impact alone does not establish a case of discrimination, the court found a discriminatory effect[36] from facts which had not previously been sufficient for such a showing.[37] Although the discriminatory effect standard had previously required some showing from which motivation could be inferred,[38] this opinion indicated that such additional facts may not be needed. The analysis, as applied by the Seventh Circuit, used the equal protection clause to require all municipalities in the metropolitan area to share the burden of meeting metropolitan housing needs.[39]

There were, however, instances where disproportionate impact alone seemed to be sufficient to prove a violation. In Joseph Skillken and Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974), and Mahaley v. Cuyahoga Metropolitan Hous. Auth., 355 F. Supp. 1257 (N.D. Ohio 1973), the respective district courts found discriminatory effect from the racially segregated patterns of the cities' and the communities' refusal to allow the building of low-income housing. These decisions were, however, subsequently reversed. Joseph Skillken and Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975); Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975).

Despite seemingly conflicting results, the different factual settings of the *Valtierra* and *Lackawanna* cases enable the two to be reconciled. *See* text accompanying notes 23 and 28 *supra*. Cases in which the governmental action appeared to be neutral and only a disproportionate impact could be shown followed the *Valtierra* decision and found no violation. *See* note 26 *supra*. When the events surrounding the governmental action evidenced a possible discriminatory motivation, the courts used the historical context, ultimate effect analysis of *Lackawanna* to find what they called a discriminatory effect. Although disproportionate impact and discriminatory effect are semantically related, the *Lackawanna* discriminatory effect standard applied only where some discriminatory motivation could be inferred from the historical context. Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) provides an example of such an inference in a challenge against the town for failing to provide equal municipal services to lower-income areas of the town. The court cited *Lackawanna* and then noted that the facts supported a "reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination . . . . " *Id.* at 1173.

35. 517 F.2d 409 (7th Cir. 1975).

36. Discriminatory effect as used here refers to its use in the *Lackawanna* line of cases. *See* text accompanying notes 28-34, *infra*.

37. The court looked to the segregated nature of the Chicago area and stated: "Thus the rejection of [the housing project] has the effect of perpetuating both this residential segregation and Arlington Heights' failure to accept any responsibility for helping to solve this problem." 517 F.2d at 414. The court goes on to state that: "[M]erely because Arlington Heights did not directly create the problem does not necessarily mean that it can ignore it." *Id.*

38. *See* note 34 *supra*.

39. The Seventh Circuit's decision indicated that all that was needed to compel the building of low-income housing in the suburbs was evidence of the racially segregated

The United States Supreme Court's decision in *Arlington Heights*[40] recognized that the standard of review under the fourteenth amendment had shifted from a finding of strict discriminatory effect[41] to a more lenient standard and, after disposing of the standing issue,[42] held

nature of a city and the lack of affirmative remedial action by a suburb. This type of requirement closely parallels the approach used by the New Jersey Supreme Court in Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

Regional considerations would place a fair share burden on suburban communities to help alleviate the housing problem. A fair share approach would consider:

1. Existing need of the town
2. Amount of employment and number of non-residents employed in the town
3. Future employment and amount of land zoned to provide employment
4. Adequacy of public services for new development
5. Ecological soundness of development
6. Ability of the town to economically support low-income housing
7. The policy of equalizing the distribution of income groups
8. Varying types of regional contributions by towns with low-density, low employment and little developmental pressure
9. Varying length of travel to work among different income groups
10. Other local, state, or county plans.

These concerns would aid in providing for a practical and equitable distribution of housing needs in order to provide for the general welfare of the total regional area. Williams, *On From Mount Laurel: Guidelines on the "Regional General Welfare"*, 1 VERMONT L. REV. 23, 40-41 (1976). The "regional general welfare" approach used by the New Jersey Supreme Court, however, raises the issue of the proper function of the judiciary in deciding the scope of regional general welfare. *See* Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976). The New Jersey Supreme Court subsequently modified *Mt. Laurel* in Oakwood at Madison, Inc. v. Township of Madison, —N.J.—, 371 A.2d 1192 (1977). *Oakwood* held, contrary to *Mt. Laurel*, that the court should not determine the regional area to be provided for or designate the exact number of units to be built. *See* 29 LAND USE LAW & ZONING DIG. 20 (No. 3, 1977).

40. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

41. *See* note 34 *supra*.

42. The standing problem in a zoning case has caused some controversy when the complaining party is not a resident of or does not own land in the community. The federal courts have held that without this requisite there is no "injury in fact." *See* Warth v. Seldin, 422 U.S. 490 (1975). *See generally* Note, *Alternatives to* Warth v. Seldin: *The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976). Another method of asserting standing is for the plaintiff to show that the interest he is trying to protect is within the "zone of interests" protected by the constitutional guarantee in question. Here again the courts have not allowed an expansive application in zoning cases. The Supreme Court has chosen to rest the standing decision on whether or not a specific project site had been selected. If a particular site had been chosen the court would find "injury in fact." *See* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972).

In the *Arlington Heights* case the Court found standing both for the Metropolitan Housing Development Corporation and for a prospective resident of the housing project. The corporation had clearly been injured by the defendant's action and the prospective resident had asserted a specific grievance, focused on the specific project. Village of

that a racially discriminatory motivation must be shown. Because of the difficulty in proving motivation[43] the Court agreed that the inquiry may encompass circumstantial evidence which is only indirectly probative of discriminatory motivation.[44] The clear implication, therefore, is that the analysis contemplated by the Court is the same as that used in cases following the *Lackawanna* decision.[45] However, by requiring a finding of racial motivation, the Court foreclosed any expansion of the discriminatory effect standard which would impose an affirmative duty on municipalities to remedy existing segregation in the housing market.[46]

Although this holding does not create any drastic changes in the practical aspects of challenging exclusionary zoning practices, the Court stated in dicta a proposition that may have far-reaching ramifica-

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Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977). *See* Note, *Alternatives to* Warth v. Seldin: *The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976).

43. Whether or not a court should try to determine the motivation behind a legislative action has been the subject of much controversy. The arguments against looking to motivation deal with the difficulties of ascertaining motivation and the futility of striking down an otherwise good law. Others have simply felt that such a review represents improper judicial inquiry. *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. Arguing in favor of judicial review of motivation, Brest suggests four points: 1) Governments may not constitutionally attempt to obtain certain objectives, *i.e.*, discrimination on the basis of race or the control of religious belief; 2) An illicit objective may be a determinative factor in a decision, and to the extent that it is, it should not have been considered; 3) The legislature is the forum which assesses the "[u]tility and fairness of a decision. And, since the decisionmaker has assigned an incorrect value to a relevant factor, the party [adversely affected] has been deprived of his only opportunity for a full, proper assessment;" 4) If the complaining party can establish that an illicit objective played a part in the decision the action should be invalidated unless there is clear proof that the illicit consideration was not determinative of the outcome. *Id.* at 95. Brest's fourth point does not seem to lend support to the notion of judicial review of motivation. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

44. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The Court directs review to the "historical background" and notes that it "may shed some light on the decisionmaker's purposes." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

45. The "historical background" inquiry enunciated by the Court is the same as the "historical context" analysis approved of in Reitman v. Mulkey, 387 U.S. 369 (1967), and relied on in *Lackawanna*. *See* notes 31-32 and accompanying text *supra*.

46. The Court limited the possible expansion of the discriminatory effect standard which resulted from the language involved. This language left open an opportunity to pull away from any inquiry into motivation such as that used in the *Lackawanna* decision. It became evident that the courts were beginning to seize that opportunity to expand the discriminatory effect standard. *See* note 34 *supra*.

tions. The Supreme Court suggested that even when discriminatory motive is proved, the act in question may nevertheless escape condemnation by shifting the burden of proof to the municipality to show that the same action would have taken place in the absence of discriminatory motivation.[47]

This shift in the burden of proof was first developed in *Washington v. Davis*[48] when the Supreme Court found that strict scrutiny review does not always apply where race is concerned. In that case the Supreme Court relied on a series of earlier jury selection cases[49] and suggested that even when a prima facie case of discriminatory purpose is established, the state can rebut a presumption of unconstitutionality by showing that the disproportionate result was a product of "permissible racially neutral" actions.[50]

Although the Court in *Arlington Heights* found that the plaintiffs failed to make out a prima facie case of racial discrimination, they took the opportunity to emphasize the notion that a racially discriminatory purpose does not necessarily constitute a violation of the equal protection clause.[51]

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47. The Court stated:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977), *citing* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle , 429 U.S. 274 (1977).

48. 426 U.S. 229 (1976).

49. Alexander v. Louisiana, 405 U.S. 625 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Eubanks v. Louisiana, 356 U.S. 584 (1958).

50. Alexander v. Louisiana, 405 U.S. 625, 632 (1972), *cited in* Washington v. Davis, 426 U.S. 229 (1976).

51. *See* note 47 and accompanying text *supra*. It can be argued that the course taken in *Mt. Healthy* and *Arlington Heights* is distinct from that suggested in Washington v. Davis, 426 U.S. 229 (1976). The *Davis* analysis is drawn from jury selection cases where the proof needed to establish a prima facie case of discrimination is minimal. The standard of justification is used to rebut the presumption of discriminatory purpose. In *Mt. Healthy* a discriminatory motivation is assumed and the standard of justification is used to offer alternative reasons for accepting the governmental action. While this distinction is a clear one, it does not seem to break down the line of reasoning which ties the two approaches together. Both cases offer an alternative to the strict scrutiny review under equal protection. The *Davis* approach allows the state to rebut a prima facie case of discrimination where it appears that the plaintiff's case was too easily established to invoke strict scrutiny. The *Mt. Healthy* approach, which was extended to equal protec-

In doing so, the Supreme Court relied on *Mt. Healthy School District Board of Education v. Doyle*.[52] In *Mt. Healthy*, the Court held that although the plaintiff's exercise of his first amendment right of free speech had played a substantial part in the school board's decision not to rehire him, this alone did not necessarily amount to a constitutional violation. The Supreme Court allowed the school board to prove that the teacher "would not have been rehired in any event."[53]

In reaching the decision in *Mt. Healthy*, the Supreme Court employed a causation test[54] which permits the defendant to offer alternative justifications for allegedly discriminatory actions. By suggesting that this test be applied in a zoning context, the Court recognized that there are other interests involved in municipal zoning and planning decisions which may override discriminatory motivation. The Court, however, failed to indicate precisely what alternative justifications would be sufficient to enable the municipality's actions to escape condemnation. Nevertheless, it seems clear that the establishment of a consistent growth and developmental policy would aid a municipality in effectuating a discriminatory zoning plan.[55]

The Supreme Court in *Arlington Heights* developed a standard of review under the equal protection clause which requires the plaintiff to establish a case of discrimination that can only be satisfied in the most blatant instances. This doctrine presents a dangerous standard of judicial nonintervention which could give deference to planned discrimina-

tion review in *Arlington Heights*, is yet further recognition of the fact that areas exist in which strict scrutiny should not be used even though racial discrimination was shown.

52. 429 U.S. 274 (1977).

53. *Id.* at 286.

54. This causation test was previously used in criminal procedure cases. Parker v. North Carolina, 397 U.S. 790 (1970) (although there had been an involuntary confession, a guilty plea a month later would be viewed as voluntary). In Wong Sun v. United States, 371 U.S. 471 (1963), the Court assumed that defendant's arrest had been unlawful, but found that "[t]he connection between the arrest and the statement [given several days later] had 'become so attenuated as to dissipate the taint.' " *Id.* at 491, *citing* Nardone v. United States, 308 U.S. 338, 341 (1939) (the case concerned the effect of illegal wiretapping on the rest of the government's evidence). In Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the Court explained that such a causation test was needed in order to protect "against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.* at 287.

Thus the causation test allows the defendant an additional chance to maintain its decision or action despite the impermissible consideration in the decisionmaking process.

55. It is quite possible that a well-planned buffer policy as used in *Arlington Heights* would be sufficient to justify an exclusionary act.

tion. Such a result not only presents almost insurmountable barriers to injured parties, but also impliedly approves of the carefully planned segregated community.

Jerrold Frumm